INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 471

ANTHONY M. PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 425–430) is reported at 258 F. 2d 397.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1958 (R. 430–431), and a petition for rehearing was denied on September 25, 1958 (R. 438). The petition for a writ of certiorari was filed on October 24, 1958, and granted on December 8, 1958 (R. 440). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether it was error to refuse to allow defense counsel to inspect and use for cross-examination a

memorandum written by Government agents who had conferred with a witness for the prosecution, where such memorandum had not been signed by or exhibited to the witness and was not a substantially verbatim, contemporaneous recording of what the witness had said.

STATUTE AND RULES INVOLVED

The so-called "Jencks" Act of September 2, 1957 (71 Stat. 595, 18 U.S.C., Supp. V, 3500) provides:

> *Demands for production of statements and reports of witnesses.*
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this

section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the

interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Federal Rules of Criminal Procedure:

Rule 26. *Evidence*

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 51. *Exceptions Unnecessary*

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires

the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 52. *Harmless Error and Plain Error.*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

* * * * *

STATEMENT

On February 3, 1958, after a 26-day trial, petitioner (a physician practicing in New York) was convicted in the United States District Court for the Southern District of New York of wilful attempted income tax evasion for the years 1950, 1951 and 1952, and was sentenced to three concurrent terms of 2 years' imprisonment (R. 4–5, 8–9). The Court of Appeals affirmed (R. 430–431).

The issue now presented to this Court arose in connection with the cross-examination of a Government witness, Arthur R. Sanfilippo. Accordingly, in order to put the issue in proper factual perspective, we shall set forth, first, the evidence bearing generally on petitioner's alleged tax evasion, and, secondly, the specific facts relevant here in connection with the cross-examination of Mr. Sanfilippo.

THE EVIDENCE OF EVASION

On December 19, 1956, after investigation of petitioner's tax liability had been under way for four years (R. 12), he filed amended income tax returns declaring unreported income and unreported taxes

for the years 1950, 1951, and 1952, as follows (Tr. 2–15, Exs. 1, 2, 3, 1a, 2a, 3a): [1]

NET INCOME

Year	Original returns	Amended returns	Additional
1950	$18,939.51	$47,497.74	$28,558.23
1951	9,107.90	31,963.55	22,855.65
1952	18,291.69	38,254.56	19,962.87
	46,339.10	117,715.85	71,376.75

TAXES

Year	Original returns	Amended returns	Additional
1950	$5,507.48	$21,485.47	$15,977.99
1951	1,968.37	13,755.15	11,786.78
1952	5,625.09	16,128.37	10,503.28
	13,100.94	51,368.99	38,268.05

The figures used by the Government at the trial, eliminating items about which there was or may have been insufficient evidence of evasion motive, such as errors of the accountants (Exs. 646, 647; Tr. 1338–1359, 1378–1379, 1383–1387), showed failure to report, for the years 1950, 1951, and 1952, $55,487.18 (over 54%) in income (Ex. 652; Tr. 1404–1406), and almost $29,000 in taxes (Tr. 1408–1418; Exs. 1–3). The pattern of under-reporting by petitioner of his taxes extended also at least to the additional years 1948 and 1949 (Exs. 4, 5, 4a, 5a). All of the alleged unreported income was derived from petitioner's operations in the stock market, either from dividends or capital gains (Ex. 652; Tr. 1400–1406).

Petitioner maintained brokerage accounts or held stock in the names of the following nominees: Peti-

[1] Government exhibits referred to herein have been lodged with this Court. "Tr." references are to the reporter's transcript of the trial, also on file with the Court.

tioner's mother (Exs. 29, 38–42, 53–59, 71–76, 95–105, 129–132, 152 and 153; R. 20; Tr. 74); his niece (Exs. 20, 298; Tr. 110–119); and one Catherine Brady Schultz, an old friend and employee of the petitioner (Exs. 267, 329, 646, 651; Tr. 119–124). None of these nominees had control over the purchase or sale of the stock (Tr. 74, 115, 121; R. 379–380). The endorsement of the nominees' names on the dividend checks was made by petitioner (Tr. 1326–1328). None of the nominees received any of the dividends or capital gains from these transactions, which were collected entirely by petitioner (Tr. 74, 110–115, 119–124). Petitioner's accountants, who made up his returns, were not informed of the receipts (R. 30–31, 211; Tr. 1275), and none of this income from the stock held in the name of nominees was reported on petitioner's tax returns (Ex. 646; Tr. 1337–1338, 1355, 1390, 1401–1403). During the indictment years, petitioner received $3,815.27 in dividends and $7,608.54 in taxable capital gains (this figure includes only 50% of long-term capital gains) on stocks carried in his mother's name (Exs. 650, 651; Tr. 1401–1403). During these same years, petitioner took a personal exemption on his tax returns for his mother's support, but disclosed none of the income, nominally hers, on his tax returns (Exs. 1–3).

Petitioner's stocks were of two classes: (1) stocks bought on margin, the stock certificates being held by the stockbrokers, where the brokers' statements showing the dividends on such margin account stocks were submitted by petitioner to his accountants, the ac-

countants summarizing the total of these dividends for use on the tax returns (R. 27, 29–30, 57–58, 190, 196, 239; Tr. 926) and (2) stocks held personally by petitioner and registered in his name (or in the name of a nominee) where a figure as to the amount of the dividends was furnished by the petitioner to his accountants (R. 31, 61–62, 190, 196–197; Tr. 569).[2] Beginning at least as early as 1948, petitioner followed the practice of orally telling his accountants the amount of dividends on personally held stock (R. 31). A large part of the under-reporting arose from dividends on personally held stocks where the petitioner had supplied a fictitiously low figure to the accountants. Thus, in 1950 petitioner told his accountants he had received $4,000 in dividends on such stock (R. 166–167; Tr. 569), whereas he had actually received $18,644.70 (Tr. 1336; Exs. 646, 647); in 1951 petitioner told his accountants he had received an aggregate of $3,800 in dividends on such stocks (R. 196–197; see R. 190), whereas he had in fact received $20,228.78 (Tr. 1346; Exs. 646, 647).[3] Up to and including the 1950 tax year, petitioner had always sub-

[2] Some bank statements and cancelled checks (R. 111, 171, 267) and some broker's statements of cash transactions involving personally held stock (R. 29, 32, 58–61, 73, 76, 171, 288) were submitted by petitioner to his accountants; however, they were never complete and were furnished for the purpose of computing capital gains or bank interest.

[3] The 1952 return was prepared and filed in 1953 after the investigation of petitioner had begun in December 1952 (R. 12–13). While petitioner considerably increased for 1952 the amount of dividend income he reported on personally held stock, he reported dividends totalling only $21,855.18 on such stock when he had actually received $27,393.36 (Exs. 646, 647; Tr. 1348–1349).

mitted a lump sum figure for his personally held stock (R. 61).

CROSS-EXAMINATION OF GOVERNMENT WITNESS SANFILIPPO

The accounting firm of Arthur R. Sanfilippo & Company prepared petitioner's state and federal tax returns. Arthur R. Sanfilippo, a certified public accountant and principal partner in the firm, was petitioner's brother-in-law (R. 15–16; Tr. 272–273). For many years Mr. Sanfilippo had acted as petitioner's tax consultant, advising him generally on tax matters and specifically informing him that capital gains and dividends were taxable (R. 16–18, 21–23). Petitioner furnished the information for the preparation of the tax returns, with the exception of petitioner's real estate income (R. 21, 37–38, 104, 195, 242; Tr. 298–299, 606). The Sanfilippo firm, which kept the real estate books and records, supplied the figures for the real estate income on the tax returns (R. 104; Tr. 298–299, 606, 968). While the employees in the Sanfilippo office generally compiled the information for preparation of the returns, Mr. Sanfilippo or his partner, Mr. Amoruso (R. 66), checked the drafts of the returns, after they were completed, for omissions or errors (R. 36–37, 58–59, 95, 100–102, 341, 353–354, 361). In preparing petitioner's tax returns the Sanfilippo firm was not engaged to conduct an audit of his financial affairs (R. 42, 57–58, 103–104, 112–113).[4]

[4] For one of the years for which the petitioner was indicted, 1951, petitioner had signed his return in blank and the figures were thereafter inserted by the accountants (R. 40, 189, 230; see R. 288).

On July 16, 1956, Mr. Sanfilippo had submitted to interrogation under oath before the Internal Revenue Service with respect to petitioner's tax liability. On August 23, 1956, Mr. Sanfilippo examined and signed the 44-page transcription of such interrogation (Ex. Y–7; R. 96). On that date he also executed a supplemental affidavit (Ex. Z–7) to clarify certain portions of his July 16, 1956, statement. Some time after the conclusion of this meeting with Mr. Sanfilippo on August 23, 1956, the Internal Revenue agents made a memorandum of the meeting, which was placed in the files of the Service (R. 426–427).

At the trial, on cross-examination of the witness Sanfilippo, who had testified for the Government, petitioner demanded and was furnished (1) the minutes of the witness' testimony before the grand jury (Ex. W–7; Tr. 486);[5] (2) the witness' question-and-answer statement given under oath to the Internal Revenue Service on July 16, 1956 (Ex. Y–7); and (3) the witness' August 23, 1956, supplemental affidavit (Ex. Z–7) (Tr. 545–546).[6] When the petitioner also demanded the Internal Revenue agents' memorandum of the August 23, 1956, meeting, the trial judge refused to turn it over to him (R. 159). Instead, the court ordered the memorandum sealed and marked as Court's Exhibit 2 (R. 159–160; Tr. 801–803); the exhibit was part of the record before the Court of Appeals and was considered by it in reach-

[5] The Government objected to the production of the grand jury minutes (Ex. W–7), but the District Court ordered that they be produced (Tr. 486).

[6] Copies of petitioner's Exhibits W–7, Y–7 and Z–7, all for identification, have been lodged with the Court.

ing its decision (R. 426–427); it is now certified to this Court.

Mr. Sanfilippo had been questioned by the agents, and later at the trial by Government counsel and by petitioner's counsel, about Exhibit 6, a form printed by Steiner, Rouse & Company with blank spaces provided for insertion of amounts, dates and description of dividends and interest received. Exhibit 6 contained notations of petitioner's dividends (R. 155; Br. 8), pertaining only to stocks personally held by him and not to stocks held by brokers which had been bought for petitioner on margin (Tr. 1349–1350). During the course of the investigation, petitioner had told an Internal Revenue agent that the handwriting on the Steiner, Rouse form (Ex. 6) was his, but stated that he could not recall when he had given it to his accountants (Tr. 78). Exhibit 6 is filled out for the year 1951 and for all or nearly all of the year 1952; attached to it are various sheets of paper including two adding machine tapes, one showing the total of dividends received for 1951, and the second showing the total of dividends received for all or nearly all of 1952, as taken from the figures entered on the form (Ex. 6).

Mr. Sanfilippo had stated in the July 16, 1956, interview that he had no recollection about the Steiner, Rouse form (Ex. 6), which had been found among his firm's workpapers for the year 1952, other than that the pencilled notations on the adding machine tapes attached to the form (Ex. 6) appeared to be in his handwriting; he believed the form (Ex. 6) was submitted by petitioner; but he had no recollec-

tion whether petitioner had submitted it before or after the commencement of the investigation; and he could not account for the fact that the tape indicated dividends from personally held stocks amounting to $16,269 in 1951, whereas taxpayer had reported a total of $13,575 in dividends from all stocks, including those held by brokers.[1]

Mr. Sanfilippo stated the following in the supplemental affidavit of August 23, 1956 (Ex. Z–7): The affidavit was being executed to clarify his answers given on July 16, 1956; he believed that he had pre-

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[1] The questions and answers of Mr. Sanfilippo in respect to Exhibit 6 were as follows (Ex. Y–7, pp. 32–33; see R. 145–147):

"(Off the record discussion.)

Q. There is among the work papers for the year 1952 a form printed by Steiner, Rouse and Company, which is a schedule of dividends and interest, which shows dates and initials of stock and amounts for the years 1951 and 1952, and there is also attached adding machine tapes for these two years. Tell me whether that was part of your work papers or not.

(Form submitted to witness.)

A. I have no recollection other than the notations at the top of each of the tapes appear to be my writing.

Q. Do you know whose writing that schedule is?

A. I believe submitted to us by Dr. Palermo.

Q. When did he submit that schedule?

A. I do not know.

Q. Would you know whether it was before the commencement of the investigation by the Internal Revenue or after?

A. I have no recollection.

Q. The taxpayer reported dividends in 1951 of $13,575 and that tape indicates the total of $16,269. Could you explain that?

A. I cannot account for this.

Q. You do not know when you first saw this schedule?

A. No, I don't.

Q. You did see it before though?

A. I have no recollection of it aside from this pencilled notation on top of each of the machine tapes being in my handwriting."

viously qualified his answers regarding the form (Ex. 6) in an "off the record discussion" on July 16, 1956; from examination of the Steiner, Rouse form (Ex. 6) and copies of petitioner's tax returns for 1951 and 1952, it appeared to Mr. Sanfilippo that he had received the form (Ex. 6) from petitioner after commencement of the investigation; he recalled that the Internal Revenue agent had requested additional information concerning dividends and he believed that petitioner then had supplied Mr. Sanfilippo with the form (Ex. 6) with the notations of dividends.[8]

[8] Mr. Sanfilippo's August 23, 1956, affidavit (Ex. Z-7) reads as follows (R. 151–152):

"I appeared at the office of the Intelligence Division, Internal Revenue Service on July 16, 1956 and was interviewed under oath by Special Agent Eugene W. Harper in connection with the income tax liability of Dr. Anthony M. Palermo.

"I wish to clarify a portion of that statement appearing on Pages 32 and 33 with reference to a form printed by Steiner, Rouse & Company entitled "Schedule of Dividends and Interest" which was among my work papers and which shows a schedule of dividends of Dr. Palermo for the years 1951 and 1952. Attached to this form were adding machine tapes totaling $16,269.78 in 1951 and $21,565.18 in 1952. I stated on July 16, 1956 that the handwriting on these tapes was mine; that I had no recollection of seeing it before; and therefore I could not say when I first saw this form.

"I wish now to comment further on this schedule of dividends. I believe that at the time I qualified my answers in an "off the record discussion" as shown on Page 32. I wish at this time to qualify and clarify my answers. It appears from examination of the Steiner, Rouse form and photostatic copies of Dr. Palermo's tax returns for 1951 and 1952 that I received this form with the notations of dividends from Dr. Palermo after Revenue Agent Mishler had commenced his examination of Dr. Palermo's returns. I recall that Mr. Mishler requested additional information concerning the Doctor's dividend income and I believe that Dr. Palermo supplied me with this form with the notations of dividends at that time."

At the trial, Mr. Sanfilippo testified, in accordance with his recollection in the supplemental affidavit, that petitioner had furnished him with the Steiner, Rouse form (Ex. 6) in 1953 after the Internal Revenue agent had found discrepancies in petitioner's 1951 dividend income and had requested additional information (R. 27, 41, 62, 80–84, 140–142, 150). Thereafter, Mr. Sanfilippo had used the 1952 figures found on the form (Ex. 6) for preparation of petitioner's 1952 return since it was on hand at the time the 1952 return was prepared (R. 31, 82–83).

Mr. Sanfilippo was extensively cross-examined about Exhibit 6 (R. 62–63, 80–84, 140–151), and was specifically examined about his July 16, 1956, statement (Ex. Y–7) that he had no recollection as to when petitioner had given him the Steiner, Rouse form (Ex. 6) (R. 144–151). Mr. Sanfilippo was also confronted with his supplemental affidavit of August 23, 1956, *supra* (R. 151–152). On cross-examination, Mr. Sanfilippo explained that the information contained in the supplemental affidavit (Ex. Z–7) was arrived at about the same time as when he gave his original testimony on July 16, 1956 (R. 150–151), and that after his July 16, 1956, interview with the agents he had talked with his partner, Mr. Amoruso, concerning what the Steiner, Rouse form (Ex. 6) had to do with petitioner's income tax returns, and as a result of this conversation his memory had been refreshed so that he then clearly recalled that Exhibit 6 had not been received until the early part of 1953 (R. 148–150).

Mr. Sanfilippo had been absent from New York during the time that petitioner's 1951 return was being

prepared (R. 39–40, 66–67, 167; Tr. 817–818, 861). The Sanfilippo partner, Mr. Amoruso, who had known petitioner for about thirty years (R. 184), secured the information from petitioner for use in preparation of the latter's 1951 return (R. 195–197, 226, 262). Mr. Amoruso testified at the trial that he had personally received from petitioner the additional amounts aggregating $3,800 for 1951 dividends on petitioner's personally held stock, which figure was used in computing the total amount of his dividends (R. 196–197). Mr. Amoruso further stated that while he had seen the Steiner, Rouse form in 1953 (Ex. 6) when they were preparing petitioner's 1952 tax return, he had not seen it during the time that he was preparing petitioner's 1951 tax return (R. 209) in early 1952 (R. 197).

SUMMARY OF ARGUMENT

I

The sole issue in this case is whether reversible error was committed in denying petitioner's request for production of Court's Exhibit 2 for cross-examination of Government witness Sanfilippo.

In requesting production, petitioner disclaimed any contention that production was authorized under 18 U.S.C. 3500, the so-called "Jencks" Act. His sole argument was that he was entitled to the document under the principles declared in *Jencks* v. *United States*, 353 U.S. 657. In denying production, the trial court ruled that the statute provided the exclusive criteria for determining whether production of such a document was required under the circumstances.

It is the Government's position, more fully de-

veloped in our brief in No. 435–437, *Lev. et al.* v. *United States*, that in enacting 18 U.S.C. 3500 Congress properly established a federal rule of criminal procedure prescribing exclusive standards for determining when a "statement" or "report" of a Government witness to an agent, in the possession of the United States, is required to be produced at the trial.

Under the statutory procedure, a summary of prior oral statements prepared by the Government agents, and which has not been approved by the witness, is not a "statement" which must be produced for cross-examination of such witness. As the Court of Appeals held, and as the description of the document itself clearly indicates, Court's Exhibit 2 is such a summary.

II

In the circumstances of this case, even if it be assumed that production of Court's Exhibit 2 should have been required, the failure to do so was not prejudicial to petitioner.

The situation here is quite unlike that in *Jencks*. Here, petitioner received, and extensively used in cross-examination, other voluminous pre-trial statements of the witness. These other statements not only were more reliable than the hearsay document embodied in Court's Exhibit 2, but they were equally close in point of time to the events to which they relate. The witness in this case was friendly and related to the defendant, and cooperated with defense counsel throughout the investigation. An examination of Court's Exhibit 2 and the other pre-trial statements, all of which are before this Court, will dem-

onstrate that Court's Exhibit 2 is merely cumulative and repetitious, and any error in denying its production was clearly harmless in the present circumstances.

ARGUMENT

I

AS A SUMMARY OF PRIOR ORAL STATEMENTS WHICH WAS NOT APPROVED BY THE WITNESS, COURT'S EXHIBIT 2 WAS PROPERLY EXCLUDED FROM PRODUCTION FOR PURPOSES OF CROSS-EXAMINATION

The sole issue in this case is whether the trial court committed reversible error in denying petitioner's request for production of Court's Exhibit 2 for purposes of cross-examining Government witness Sanfilippo.

In considering the correctness of this ruling, it should be noted at the outset that Court's Exhibit 2 was requested as a document concededly not authorized to be produced under 18 U.S.C. 3500. Thus, after the document which has become Court's Exhibit 2 was requested "for use in cross-examination of Mr. Sanfilippo", the trial court examined it, and referring to the limitations of 18 U.S.C. 3500, inquired of defense counsel how he hoped to bring himself within the statute (R. 153). Defense counsel replied (R. 153):

> I do not hope to bring myself within it; I do not think I belong within it.

Defense counsel then proceeded to argue that under this Court's prior decision in *Jencks* v. *United States*, 353 U.S. 657, he was entitled to the document even though it was not a statement authorized to be pro-

duced under 18 U.S.C. 3500; that in enacting this legislation with respect to the production of documents for cross-examination of Government witnesses Congress did not preempt the field; and that, if it did, the statute was unconstitutional (R. 154–158).

It was such a request that the trial court denied, ruling that 18 U.S.C. 3500 properly established exclusive criteria for determining whether production was required under the circumstances. Whether that ruling constituted reversible error is the single question before this Court.[9]

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[9] A party is required to make known to the court, at the time the ruling of the court is made or sought, not only the action which he desires the court to take or his objection to the action of the court, but also the grounds therefor. Rule 51, Federal Rules of Criminal Procedure, *supra*, pp. 4–5. After the trial judge ruled against petitioner on the specific ground advanced by him for production of Court's Exhibit 2, he cannot be heard to argue on appeal that production of the exhibit would have been proper on a different ground. This is so for the same reasons that a defendant is precluded from first raising on appeal a different reason for exclusion of evidence than that advanced to the trial judge. *United States* v. *Sing Kee*, 250 F. 2d 236, 242 (C.A. 2d), certiorari denied, 355 U.S. 954; *Smith* v. *United States*, 224 F. 2d 58, 61 (C.A. 5th), certiorari denied, 350 U.S. 885; *Chin Gum* v. *United States*, 149 F. 2d 575 (C.A. 1st); I Wigmore, *Evidence*, Sec. 18 (C) (1). Even when an objection to the ruling has been properly made in the trial court but not pressed in the Court of Appeals, only in exceptional circumstances will this Court review the propriety of the ruling. *Lawn* v. *United States*, 355 U.S. 339, 362, fn. 16; *Husty* v. *United States*, 282 U.S. 694, 701–702; *Duignan* v. *United States*, 274 U.S. 195, 200. Accordingly, the specific disavowal by petitioner in the trial court of any claim that he was entitled to Court's Exhibit 2 under the provisions of 18 U.S.C. 3500 prevents him from being heard to make such an argument on review.

In this connection, it is important to point out that if in the trial court petitioner had taken issue with, rather than

As set forth more fully in Point I of the Government's brief on the merits in Nos. 435–7, *Lev, et al.* v. *United States,* at pp. 30–61, Congress, in enacting 18 U.S.C. 3500, established a federal rule of criminal procedure providing exclusive standards for determining whether a "statement" or "report" of a Government witness to an agent, in possession of the United States, must be produced for use in impeaching the witness on cross-examination. Both the language and the legislative history of the statutory provisions make it clear that Congress, in response to this Court's holding in *Jencks* v. *United States,* 353 U.S. 657, promulgated a rule which would govern future application of the *Jencks* principle. Congress decided that there should be required to be produced for impeaching a particular Government witness on cross-examination only those prior statements which were fairly attributable to that witness. Congress also made the judgment, and accordingly provided, that the only written versions of prior oral statements which were fairly attributable to the witness were (a) those which he had approved or adopted; and

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accepted without challenge, the Government's position that Court's Exhibit 2 was not a document required to be produced under 18 U.S.C. 3500, any deficiencies in the record on that question could have been supplied. For example, if there should be any doubt whether Mr. Sanfilippo had approved or adopted Court's Exhibit 2 as his own statement, or whether that document constituted a substantially verbatim recording of Mr. Sanfilippo's prior oral statements, the record could have been amplified to remove such doubt if petitioner had contended at the trial that the document constituted a "statement" as defined in 18 U.S.C. 3500. See *Giordenello* v. *United States,* 357 U.S. 480, 488.

(b) those which constituted substantially verbatim recordings of his prior oral statements.

As we show in Nos. 435–7, the reasonableness of this legislative judgment is patent—it prevents a witness from being confronted with prior, allegedly inconsistent, statements which cannot be reliably said to be his. In the absence of such a rule, a trial of the guilt or innocence of an accused could degenerate into a confusing and time-consuming, if not impossible, attempt to determine collateral issues relating to the true authorship of statements sought to be attributed to particular witnesses. It is well settled—under decisions of this Court—that it was within the constitutional power of Congress to establish such a reasonable federal rule of criminal procedure.

Under this statutory rule, an investigator's condensed summary of a witness' prior oral statements—which by its very nature is obviously not a substantially verbatim recording—is excluded from production for purposes of impeaching that witness on cross-examination unless the summary has been approved or adopted by the witness. Notwithstanding petitioner's trial concession with respect to Court's Exhibit 2 (*supra,* p. 17), the Court of Appeals examined that document, as had the trial court, and concluded that it was a summary of prior oral statements which was not approved by the witness, a type of document which, as we have shown, is excluded from production under 18 U.S.C. 3500. That conclusion is plainly correct.[10]

[10] On the propriety of *in camera* inspection, see the Brief for the United States in No. 451, *Rosenberg* v. *United States*, at pp. 42–62.

The four-page conference memorandum which has been sealed as Court's Exhibit 2 (R. 159–160) was aptly described by the Court of Appeals as follows (R. 427):

> It is quite apparent from the record that this memorandum was made from memory by one of the agents and was not intended to be a "substantially verbatim recital" of anything said by the witness. It was merely a summary of the agent's recollection of what had transpired at the meeting. The witness had not signed, adopted or approved it. It does not appear that the memorandum was a transcript of notes taken during the interview or that it purported to be a recorded verbatim recital, or nearly so, of what the witness had said.

The memorandum, consisting of only *fifty-five typewritten lines,* relating to a conference which the heading indicates lasted *three and one-half hours,* is obviously not a substantially verbatim recording. Nor was it approved or adopted in any manner by Government witness Sanfilippo; it was signed only by Agent Harper, sometime after the conference, and later by Agent McGowan. It is merely their summarized version of prior oral statements. Under the legislative standards established in the "Jencks" Act, it is not fairly attributable to Government witness Sanfilippo, and not subject to compulsory production.

II

IN THE CIRCUMSTANCES OF THIS CASE, ANY ERROR IN DENYING PRODUCTION OF COURT'S EXHIBIT 2 WAS NOT PREJUDICIAL TO PETITIONER

Assuming *arguendo* that the trial court erred in denying petitioner's request for production of Court's Exhibit 2 as a document not authorized to be produced under 18 U.S.C. 3500, there remains the question whether in the circumstances of this case such error was prejudicial to petitioner. Rule 52(a), Federal Rules of Criminal Procedure, *supra*, p. 5; *Lutwak* v. *United States*, 344 U.S. 604, 619–620; *Kotteakos* v. *United States*, 328 U.S. 750.

As pointed out in our brief in Nos. 435–437, *Lev, et al.* v. *United States*, pp. 77–80, this Court's decision in *Jencks* did not abrogate the harmless error doctrine insofar as it relates to cases involving production of documents for cross-examination of Government witnesses. The very fact that *Jencks* did not overrule *Goldman* v. *United States*, 316 U.S. 129, suggests that *Jencks* did not deprive trial courts of all discretion whatsoever in requiring production of documents, particularly in a situation where, unlike that in *Jencks*, other documents were furnished for cross-examination and the additional documents sought (but not produced) were merely cumulative. Indeed, subsequent to *Jencks* this Court held in *Lawn* v. *United States*, 355 U.S. 339 (fn. 16, p. 362), that the trial court's denial of a request to produce certain pre-trial statements of a Government witness, where the defense already had other pre-trial statements of the

witness, would not be considered plain error affecting substantial rights without a showing of exceptional circumstances.

The circumstances in which production was denied in *Jencks* were quite unlike those in this case. In *Jencks,* the defense was not armed with other pre-trial statements of the witnesses; the unproduced documents were not merely cumulative but rather were essential if the defense was to be in any position to confront the witnesses with pre-trial statements which might be at variance with their trial testimony. The unproduced documents in *Jencks* were not only deemed to be authentic statements of the witnesses themselves but those statements appeared to be the only ones recording the events before time might have dulled the witnesses' memories. The Government witnesses in *Jencks* were not friendly or related to, or shown to have been cooperating with, the defendant, but rather were hostile to the defense. In *Jencks,* the unproduced documents had not been exhibited to and examined by the courts below; accordingly, those courts could not discharge any duty of determining whether denial of production had been harmless. In the instant case, we submit, the entirely different facts require a different result.

Although the trial court denied petitioner's request for production of Court's Exhibit 2 for cross-examination of Government witness Sanfilippo,[11] defense

[11] The testimony on direct examination of both Sanfilippo and his partner, Amoruso, was not uncorroborated, as petitioner suggests. (Br. 7–8.) On the contrary, there was a considerable body of oral testimony and documentary evidence corroborating the testimony of the two accountants, such as the

counsel did receive, and fully used in unrestricted cross-examination of the witness, other lengthy, pre-trial statements covering the same subject matter. Petitioner was furnished with transcriptions of the actual statements which the witness Sanfilippo had previously given to the Government agents concerning his knowledge of petitioner's income tax matters, the 44-page question-and-answer statement taken from Mr. Sanfilippo (Ex. Y–7), and the clarifying affidavit of August 23, 1956, executed by Mr. Sanfilippo at the same time he signed the question-and-answer statement (Ex. Z–7), as well as his 34-page grand jury testimony (Ex. W–7). These other statements were more reliable, being the actual verbatim statements of the witness; they were also equally close in point of time to the events to which they relate; moreover, they had the additional quality of being given under oath, whereas the agent's summary (besides being hearsay as to the witness) was not so made.

Because of the great latitude allowed him by the trial court, petitioner's counsel was able to conduct a vigorous defense, particularly in his cross-examination of the Government witnesses. Sanfilippo, whose direct and redirect examination took only parts of two trial days and 113 pages of the reporter's trial transcript (Tr. 272–351, 912–944), was cross-examined for a period of six trial days covering over 500 pages of the reporter's trial transcript (Tr. 351–402, 434–

accountants' original workpapers which were identified by other witnesses (R. 31, 83, 98, 102, 108, 117, 166–167, 185, 186, 196–197, 270–271, 279–280, 285–287, 322, 330, 337, 362, 365, 383).

464, 487–785, 804–912, 944–958), particularly as to his prior question-and-answer statement (Ex. Y–7), the clarifying affidavit (Ex. Z–7) (R. 96–97, 144–152), and Exhibit 6 (the Steiner, Rouse form) (R. 62–63, 80–84, 140–151).[12] Due to the trial court's leniency in these matters, the petitioner was able to exploit to the utmost the witness Sanfilippo's failure at the July 16, 1956, meeting fully to identify the Steiner, Rouse

[12] Petitioner says that a "completely disinterested witness, called by the government itself" testified that she saw and worked on Exhibit 6 in 1952 (Br. 9). What the petitioner does not say is that the witness, a Mrs. LaCombe, who was pregnant and admittedly frightened and nervous (Tr. 1289, 1299), had told the Government prosecutor that she had worked on Exhibit 6 after a Mr. DeGeorge had begun working in the Sanfilippo firm (R. 289, 292; see also Tr. 1291), and the latter did not begin working for the firm until at least November 1952 (R. 278), long after the 1951 tax return had been prepared. Thus, it would have been impossible for the witness to have worked on Exhibit 6 in connection with the 1951 return if it was used during a period when Mr. DeGeorge worked for the firm. The petitioner also does not mention that, the next day after the witness testified, the Government prosecutor requested permission to recall the witness and stated that since completion of the witness' testimony the prosecutor had talked with the witness who told him that her testimony was unintentionally wrong because in fact she was unable to fix the dates when she worked on Exhibit 6. The defense counsel opposed recalling the witness and the trial judge refused permission (Tr. 1283–1311). These facts must be noted in view of the attempt by the petitioner to capitalize on what was clearly mistaken testimony.

Moreover, unless it be assumed that the Steiner, Rouse form was passed back and forth between the petitioner and the Sanfilippo firm, and there was no testimony to that effect, it was impossible for the Sanfilippo firm to have had Exhibit 6 on hand in time for preparation of the petitioner's 1951 tax return in early 1952, since there are forty dividend entries on Exhibit 6 which bear dates on and after April 1, 1952.

form (Ex. 6), which had been found with the work-papers associated with the 1952 return. (R. 144–151.)[13]

The extent of cross-examination is, of course, within the sound discretion of the trial court. *Alford* v. *United States,* 282 U.S. 687, 694. To hold that the trial court's refusal to turn over the agent's summary of the meeting with Sanfilippo constituted reversible error would be tantamount to finding an abuse of discretion where, in actual fact, the actions of the trial judge in turning over Sanfilippo's grand jury

[13] Even though Sanfilippo was originally unable to recall the details as to Exhibit 6, his prior statements, considered together, are in no way inconsistent with his trial testimony in which he did identify Exhibit 6.

Mr. Sanfilippo explained on his cross-examination that the information contained in the August 23, 1956, affidavit was first recalled at about the same time that he gave his original statement on July 16, 1956. *Supra*, p. 14. This trial testimony is corroborated by Mr. Sanfilippo's August 23, 1956, affidavit (Ex. Z–7), which states that he had previously qualified the answers which he had given on July 16 on this subject by an "off the record discussion." Moreover, between July 16 and August 23, Sanfilippo had talked with his business partner about the matter and had then clearly recalled that Exhibit 6 had not been received until 1953. Mr. Sanfilippo's recollection, which had first come to him in an off-the-record discussion on July 16 and had subsequently become clear after a discussion with his partner, was thus well established before the August 23, 1956, meeting between the witness and the agents. Petitioner now contends that, as a result of the trial court's denial of production of the agents' memorandum with respect to the August 23 meeting (Court's Ex. 2), he was prevented from ascertaining what went on at the August 23 meeting which caused the witness to have a refreshed recollection about Exhibit 6 (Br. 12). But, as we have shown above, the agents' memorandum of the August 23, 1956, meeting could not reflect any "change in the witness' position as to Exhibit 6" (Br. 11), since Sanfilippo had already arrived at his refreshed recollection before he appeared at the

testimony as well as his prior statements showed a most ample and generous consideration of the defendant's rights. Under these circumstances, we submit that the judge's action did not transcend the limits of sound discretion. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234.

In considering the need of defense counsel for Court's Exhibit 2 to cross-examine Mr. Sanfilippo, it should be borne in mind not only that he was the brother-in-law of the defendant, whom he had advised for years and whose books with respect to real estate operations he was still keeping at the time of trial (Tr. 274, 347), but also that Mr. Sanfilippo was shown to have cooperated fully with the defense throughout the investigation. Thus, prior to Sanfilippo's interview with the Internal Revenue agents on July 16, 1956, in answer to a summons to testify regarding petitioner's case, he met with petitioner's

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office of the Internal Revenue Service on August 23, 1956, to sign his original statement and to execute the supplemental affidavit.

Furthermore, it is difficult to understand how Mr. Sanfilippo could be impeached by any statement he could have made as to the relation of Exhibit 6 to petitioner's 1951 tax return (Br. 9) or by any showing of "a failure of communication between the partners in the accounting firm" regarding Exhibit 6 (Br. 9), since Sanfilippo was admittedly not present when the 1951 tax return was prepared (Br. 9), being absent from New York City from January through April 1952 (R. 167). All of the information which went into that tax return was gathered by Mr. Amoruso, his partner, and the latter testified that he did not see the Steiner, Rouse form (Ex. 6), revealing individual items of dividends on personally held stock, at the time he was preparing petitioner's 1951 return (R. 209). Indeed, Mr. Amoruso testified that he had secured the figures (aggregating $3,800), used on the tax return for dividends on personally held stock for 1951, from petitioner (R. 196–197).

counsel (Tr. 575, 779–782, 932). Thereafter, when Mr. Sanfilippo, on August 23, 1956, had signed his statement given under oath to the Internal Revenue Service (Ex. Y–7) and had received a copy of it, he furnished the copy to petitioner's counsel (Tr. 932–934; Ex. 634). The question-and-answer statement of the Sanfilippo partner, Mr. Amoruso, had also been furnished defense counsel prior to trial (Ex. 634). Mr. Sanfilippo had two conferences with petitioner's counsel prior to trial (Tr. 575–576, 949) as did Mr. Amoruso (R. 210–211, 235–236, 252, 256, 259, 263, 269). Mr. Sanfilippo had also, prior to trial, turned over to defense counsel the Steiner, Rouse form (Ex. 6) (see Ex. 634). Defense counsel also had possession of, and used prior to trial, the Sanfilippo firm's workpapers pertaining to petitioner's return (R. 235, 254, 279, 311–312, 363).

This is not a case in which we seek a ruling of harmless error (if there was error at all) *in vacuo*. It is highly significant that Court's Exhibit 2, the particular document at issue, was actually examined by both courts below and has been certified to this Court, together with the voluminous pretrial statements of the witness which were furnished to defense counsel. Examination of Court's Exhibit 2 will reveal that it is merely cumulative and repetitious.[14] Denial of production under these circumstances was not prejudicial to any substantial rights of petitioner. *Lawn* v.

[14] In the Court of Appeals, the Government made the following comparison in its brief (p. 27) between Court's Exhibit 2, not furnished to the petitioner, and the actual pre-trial statements of Sanfilippo which were furnished to the petitioner:

"It [Court's Ex. 2] referred to the following matters:

United States, supra; Gordon v. *United States*, 344 U.S. 414, 423.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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APRIL 1959.

"(1) The kind of records and information submitted by Palermo to Sanfilippo and his firm and the occasion of these submissions.

This subject was covered by pages 7, 9, 18, 24, 26, 29, 31, and 32 of Exhibit Y–7 and at pages 14–15 of the grand jury testimony (Exh. W–7).

(2) The subject of Palermo's diary.

This topic was discussed in both the question and answer statement (Exh. Y–7, page 16) and the grand jury testimony (Exh. W–7, page 5).

(3) The keeping of records by Sanfilippo pertaining to Palermo's real estate and fees received therefor.

This was mentioned at page 10 of Exhibit Y–7 and at page 2 of Exhibit W–7.

(4) The role of Sanfilippo's firm in preparing Palermo's income tax returns.

This came up on a number of occasions during the questioning of Sanfilippo by the Special Agents (Exh. Y–7, pages 23, 24, 34 and 40), and the witness gave additional testimony about it before the grand jury (Exh. W–7, pages 4, 7 and 21). None of the matter stated in Court Exhibit 2 on these subjects is inconsistent in any material way with either Sanfilippo's grand jury testimony or his statements to the Internal Revenue Service which were furnished to, and used by, defense counsel in cross-examination."

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